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Workmen's Compensation--Meaning and Effect of Casual Employer Proviso

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activity, engendering reliance thereon, it has a duty to use reasonable care in the maintenance of the lighthouses or to warn the public that the lighthouses are no longer operating properly. The Court does not look to the specific activity; it merely looks to the fact that the government has undertaken something which it is not required to do. A private individual in similar circumstances would be liable if he did not use reasonable care. Thus the statute makes the government liable.

The statute, 28 U.S.C. § 2680 (1952), lists several exceptions to the statute granting consent for the government to be sued. The *Feres* and *Dalehite* cases add one more—the government does not consent to be sued for negligence in the performance of uniquely governmental activities. This exception is now limited by the decision in the principal case. The court distinguishes between unique activities which the government is required to undertake and those which it is not required to undertake. The statute establishes liability for negligence in the performance of the latter.

W. A. K.

WORKMEN'S COMPENSATION—MEANING AND EFFECT OF CASUAL EMPLOYER PROVISIO.—In an action to recover damages for injuries suffered while plaintiff was driving a truck belonging to the defendant, the circuit court rendered judgment for the plaintiff and the defendant prosecuted a writ of error. *Held*, on appeal, that where defendant, engaged in a business, although operating it intermittently, had employed plaintiff as a sawyer and truck driver for approximately two years, plaintiff working regularly six days a week and being paid at regular two week intervals, defendant was an employer within the workmen's compensation statute; and plaintiff's contributory negligence and assumption of risk were not available as defenses. *Walls v. McKinney*, 81 S.E.2d 901 (W. Va. 1954).

In the principal case, the court, at page 906, says, "The record in this case shows that the defendant was not a casual employer. . . ." This treatment of who is or is not a casual employer within the meaning of W. VA. CODE c. 23, art. 2, § 1 (Michie 1949), is probably of no importance in the principal case insofar as the result is concerned, because the defendant probably had more than three employees. However, it does raise, and leaves unanswered, some interesting questions concerning the definition of "casual employers"

contained in section 1, and the effect of the section upon the scope of the whole chapter.

W. VA. CODE c. 23, art. 2, § 1 (Michie 1955), defines "casual employers" as ". . . employers of not more than three employees for a period of not more than one month . . ." It further provides that such employers may *elect* to contribute to the compensation fund but that their failure to do so shall not deprive them of the common law defenses of the fellow servant rule, assumption of risk, and contributory negligence; whereas § 8 deprives other employers within the meaning of § 1 who fail to subscribe to the workmen's compensation fund of such defenses. At the beginning of the same paragraph of § 1, it is stated that: "All persons, firms, associations and corporations regularly employing other persons for the purpose of carrying on any form of industry or business in this state . . . are employers within the meaning of this chapter and subject to its provisions. . . ."

The first question to arise is: How is the word "employer" used in the "casual employer" proviso? Was the word used in the broader ordinary meaning of one who employs or hires the services of another, or in the more narrow sense as defined in § 1, *supra*? If the statute is to be read literally, then the proviso in § 1 would seem to read as follows: All persons regularly employing other persons for the purpose of carrying on any business or industry in this state who employ not more than three employees for a period of not more than one month are casual employers. Thus the effect of "employer" being used in this sense is immediately apparent as setting a numerical minimum on the number of employees, the exceeding of which will result in bringing an employer within that class who, as a result of failing to subscribe to the compensation fund, lose the aforementioned common law defenses. And this appears more certain considering the decision in *Drake v. Clay Hardware & Supply Co.*, 110 W. Va. 63, 157 S.E. 35 (1931), which held that the phrase "employing other persons" did not imply a plurality of employees by the individual employer, had no significance other than that of correct grammatical construction, and that the word as used could be applied to the sole employee of an employer. At that time W. VA. CODE c. 15P, §§ 9, 26 (Barnes 1923), contained no numerical minimum. However, in 1937, the proviso, substantially the same as it now exists, was added to W. VA. CODE c. 23, art. 2, § 8, by W. Va. Acts 1937, c. 104, art. 2, § 8, which provided that those employing less than ten employees and those

employing more than ten employees, but not in excess of sixty days prior to the accidental death or injury, were casual employers; and that no recovery could be had against casual employers without allegation and proof that such injuries resulted from the actual negligence of the employer. The numerical minimum first established by this amendment should prevent another application as broad as that laid down by the court in the *Drake* case, *supra*.

In view of the terms of the proviso as it existed in W. VA. CODE c. 23, art. 2, § 8 (Michie 1937), as compared with its present wording and location in W. VA. CODE c. 23, art. 2, § 1 (Michie 1955), if the foregoing interpretation or construction would have been justified at that time, is there any justification for *not* so construing it now? By W. Va. Acts 1945, the only changes appear to have been to delete the proviso from § 8, and add it to § 1, after having amended it so as to decrease the number of employees and shorten the length of time. These changes would seem to extend the scope of the provision to include more employers, but should in no way do away with requiring a minimum number of employees.

The West Virginia definition of "casual employer" is unique when compared with those of the other twenty-nine states which at the present time provide for some such exemption from their workmen's compensation statutes. The usual definition pertains to "employees" and "employments" rather than to "employers" and exempts casual employees and employment, for the most part, when employment is *both* casual *and* outside the usual course of business of the employer. 2 SCHNEIDER, WORKMEN'S COMPENSATION STATUTES § 279 (1944). It is generally held that the use of the conjunctive "and" extends the protection of the statute to far more employees and at the same time prevents an employer from evading the statutes by hiring on a day to day or week to week, etc., basis. Note, 107 A.L.R. 934 (1937). In construing these statutes, in the absence of statutory definition, the usual or ordinary definition of the word as given by the lexicographers is usually accepted. *Ibid.* Webster defines "casual" as "happening without design and unexpectedly; occasional; coming without regularity." However, "casual" has been given an arbitrary or "word of art" meaning in West Virginia, by statute. W. VA. CODE c. 23, art. 2, § 1 (Michie 1955).

Had the intent of the West Virginia legislature been to use "casual" in its ordinary sense, it would appear to have been relatively simple to just say "casual" or even to leave the word out

CASE COMMENTS

317

entirely as has been done in Texas and New York. 2 SCHNEIDER, *op. cit. supra*. If the word had been thus omitted, casual employers, "casual" here being used in its ordinary dictionary meaning, would necessarily seem to be excluded from being employers within the meaning of W. VA. CODE c. 23, art. 2, § 1 (Michie 1955). The phrases "regularly employing" and "for the purpose of carrying on" seem to indicate a legislative intent *not* to classify employers on the basis of the duration of individual contracts for hire; but rather on double standards of constancy and continuity of the occurrence of employment *and* the business or industry. In this respect, the court was undoubtedly correct in the principal case in saying that the defendant was not a casual employer.

Comparison with other workmen's compensation statutes as to a clearer meaning of the "casual employer" proviso has proven unproductive since the West Virginia statute is unique. Further, an exhaustive search has disclosed an almost complete lack of case authority on the point of comment with the exception of *Drake v. Clay, supra*. However, it appears that two quite different results can be reached, depending upon the interpretation given the "casual employer" proviso.

First: If the word "employer" used in the proviso is read literally, in its ordinary dictionary meaning, it brings within the coverage of the chapter *all* persons, firms, associations and corporations carrying on any business in the state, regardless of the number of employees. This interpretation would necessarily have the effect of practically nullifying the rather obvious "word of art" meaning of "casual employees".

Was the intent of the legislature to provide such absolute coverage that such employers as doctors, lawyers, dentists, etc., would be included as long as *one* person was regularly employed?

Workmen's compensation statutes are generally held to be social legislation and are liberally construed in favor of employees. *Chiericozzi v. Commissioner*, 124 W. Va. 213, 19 S.E.2d 590 (1942). However, there are several factors which would appear to negate the more liberal interpretation set forth in the preceding paragraph. These factors are: (1) the particular use and definition of "casual employers" as set forth herein previously; (2) the alternatives which must have been available to the legislature; (3) the less likelihood of injury where so few employees are employed (and particularly in such activities as mentioned); and, (4) the relatively slight social

benefits to be had as compared with the additional clerical and administrative work which would be required.

Second: It is submitted that the more justified and more logical interpretation of the proviso is that our compensation statute provides that: (1) all employers who regularly employ more than three employees for more than one month and who fail to subscribe to the fund are deprived of their common law defenses; and, (2) those employers who regularly employ three or less may elect to subscribe to the fund but shall not be deprived of their common law defenses for failing to do so.

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